IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.105 of 1990

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Baleshwar Mahto, son of Duli Mahto, resident of village-Kathrahi, P.S.-Bind in the district of Nalanda.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

with

Criminal Appeal (DB) No. 153 of 1990

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Khelawan Yadav, son of Late Duli Mahto, resident of village-Kathrahi, P.S.-Bind, District-Nalanda.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

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Appearance:

For the Appellant : Mr. Anjani Kumar, Sr. Advocate.
Mr. Sudhis Kumar Upadhyay, Advocate.

For the State : Mr. Dilip Kumar Sinha, A.P.P.

For the State : Mr. Dilip Kumar Sinha, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE SHYAM KISHORE SHARMA
And
HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)

Date: 13-03-2013

Appellant Khelawan Yadav who has been found guilty for an offence punishable under Section 302 Indian Penal Code as well as 27 of the Arms Act and has been directed to undergo R.I. for life under Section 302 of the Indian Penal Code while no separate sentence was passed under Section 27 of the Arms Act, appellant Baleshar Mahto who has been found guilty for an offence punishable under Section 307 Indian Penal Code and 27 of the Arms Act and sentenced to undergo R.I. for 7 years under both counts respectively with a direction to run the sentences concurrently have

filed two independent appeals which accordingly being heard together and are being disposed of by the common judgment.

2. Anandi Prasad, PW-7 had given his fardbeyan (Ext.9) at Bind Police Station along with his father Lala Mahto and brother Bindeshwar Prasad in injured condition alleging inter alia that on the same day at about 06:00 AM while he had gone to his field lying at Milki Khandha to sow paddy seed along with his father and brothers. During midst of ploughing the field, Khelawan Yadav armed with rifle, Dulli Mahto armed with Lathi, Rajendra Mahto armed with gun, Arun Yadav armed with gun, Umesh Prasad armed with Garasa, Subhash Prasad armed with Bhala, Baleshwar Mahto, Siwan Mahto armed with gun, Ram Bilas Yadav armed with Garasa, Surendra Yadav armed with gun, Ram Lagan Prasad armed with gun came. Khelawan Mahto said that why his filed is being ploughed which was retaliated by him (informant) claiming that the land belongs to him (informant). On this Dulli Mahto ordered to kill. Khelawan yadav shot at his father from his rifle causing injury over head of his father on account of which skull became fractured and he fell down in the field itself. Baleshwar Mahto fired from his gun causing injury at upper portion of his back (Pakhura) as well as over head. Ram Bilas Yadav assaulted with Garasa over his head. Umesh Yadav assaulted with Garasa over head of his brother Bindeshwari Yadav. Dulli Mahto assaulted him with lathi. Thereafter, all the accused persons began to fire indiscriminately to terrorize the persons. He named Brahamdeo Sao, Kameshwar Prasad, Ramu Sao as witness who saw the occurrence.

3. On the basis of aforesaid fardbeyan Asthawa P.S. Case No. 116 of 1982 was registered and investigation accordingly commenced. After concluding the same charge sheet was submitted under Section 302 IPC along with other allied sections on account of death of Lala Mahto whereupon the accused persons were put on trial. After concluding the same save and except these two appellants, others have been acquitted. Hence this appeal.

4. The defence case as is evident from the mode of cross-examination as well as from the statement of the accused recorded under Section 313 of the Cr.P.C. is total denial of the occurrence. They have also pleaded that on account of long standing land dispute they have been falsely implicated in this case. Moreover, the defence had also suggested that on the alleged date and time of occurrence, the prosecution party assaulted them for which Asthawa P.S. Case No. 117 of 1982 was registered. To support the same, the injury report along with FIR of counter case had also been exhibited.

5. Learned counsel for the appellant while assailing the judgment of conviction and sentence argued that the finding recorded by the learned lower court is bad and erroneous on account of non-appreciation the materials available on the record in its right prospective. The first and foremost argument on this score happens to be that when evidence of PWs have been disbelieved with regard to other co-accused (since acquitted) then in that event there was no justification to accept its reliability with regard to these two appellants. It has further been submitted that there happens to be

inconsistency amongst the ocular as well as medical evidence. The medical evidence completely diffract the prosecution version so far factum of murder of Lala Mahto by means of rifle is concerned. Then in that event, as submitted the ocular evidence should have been rejected in toto. In likewise manner, it has been argued that so far injury of Anandi Prasad, informant is concerned, again the medical evidence demolishes the prosecution version. Hence, on both score alone, the sanctity of the prosecution witnesses is found to be at stake.

6. Now challenging the veracity of the ocular evidence, it has been submitted that on account of embellishment and contradictions apart from having inconsistency as well as variations amongst the PWs on each and every material aspect, completely make the evidence unreliable, un-creditworthy.

7. It has further been submitted that the version of the prosecution appears to be ridiculous in the background of the fact that appellants never claimed the land which was alleged under cultivation of the prosecution on the alleged date of occurrence. The disputed land happens to be different one. Then in that event there was no occasion for the appellant to go over the disputed land and indulge in criminal activity. Contrary to it, it has been submitted that the defence version appears to be more probabilized whereunder the prosecution party assaulted them for which substantial case was lodged. It has further been submitted that prosecution is duty bound to prove its case beyond all reasonable doubt while the plea of defence is to be adjudged on the theory of preponderance of probability. As

such, it has been pleaded that prosecution case is suffering from infirmity and on account thereof the appeal is fit to be allowed. Also pleaded that by suppressing the injuries found over person of Appellants, the prosecution case is found to be suffering from major defect relating to genesis as well as manner of occurrence. Further submitted that the whole prosecution version is found like castle in the air as they were never in possession over P.O. land on account of land being under possession of mortgage in whose favour deed of registered mortgage was executed since before the alleged occurrence.

8. On the other hand the learned Additional Public Prosecutor while supporting the finding recorded by the learned trial court has submitted that it is not the sound principle of law that the evidence of witnesses should be discarded in its entirety when the part thereof is found to be consistent in supporting the case of the prosecution. It has further been submitted that save and except minor contradiction nothing more is found in the evidence of the PWs to discredit their evidence. It has further been submitted that the learned Trial Court had minutely observed the medical evidence in consonance with the ocular evidence and came to definite conclusion that save and except some sort of discrepancy arisen on account of opinion of the respective witnesses, the evidence in its basic tune support the injuries sustained by the deceased as well as injured respectively. Hence the finding recorded by the learned trial court is found to be fully substantiated from the materials available on the record.

9. In order to substantiate its case, the prosecution had

examined altogether ten PWs out of whom PW-1 is Ramasish Paswan, PW-2 is Dr. C.P. Sinha, PW-3 is Bhagwan Das Mahto, PW-4 is Jagarnath Yadav, PW-5 is Bindeshari Prasad, PW-6 is Brahmdeo Sah, PW-7 is Anandi Prasad, PW-8 is Dr. C.P. Sinha, PW-9 is Ramdeo Singh, PW-10 is Jai Narayan Singh. Also exhibited Ext.-1 Series with regard to injury report prepared by Dr. C.P. Sinha, Ext.-2 Series Injury Report prepared by police, Ext.-3 Signature of witnesses on production cum seizure list, Ext.-4 Signature of seizure list witness, Ext.-5 Formal FIR, Ext.-6 Signatrue of informant over fardbeyan, Ext.-7 postmortem report, Ext.-8 Chalan, Ext.-9 Fardbeyan, Ext.-10 endorsement over fardbeyan, Ext.-11 Seizure list, Ext.-12 Inquest Report, Ext.-13 Production list, Ext.-14 Letter, Ext.- 15 FSL Report. But all has been made material Ext.-I, Ext.-II Bolt, Ext.-III live cartridge, Ext.-IV Series Blood stain earth, Ext.-V. Ext.-X Series bed head ticket as well as X-ray plate marked for identification. Two witnesses Kunj Bihar Prasad as well as Dr. Kailash Pati Yadav were also examined as court witness. Defence had also examined three DWs. DW-1 Mithilesh Kumar Mandal, DW-2 M.M. Rejwi, DW-3 Muhammad Mushilim as well as had also exhibited Ext.-A Series Two acknowledgement, Ext.-B Series Petition dated 11.11.1986, 25.11.1986 respectively. Ext.-C Series Signature of Bhagwan Das over above referred Ext.-B Series. Ext.-D C.C. of sale deed No.17657, Ext.-E Order dated 16.07.1986 as well as 06.08.1986 passed in Sessions Trial No.46/84. There happens to be some sort of discrepancy in recording the exhibit number and on account thereof again Ext.-A Series has been numbered with regard to Injury report relating to Umesh, Ram

Khelawan and Dalli Mahto. Ext.-B fardbeyan, Ext.-C Formal FIR.

10. Lala Mahto (since deceased) was initially examined by Dr. C.P. Sinha (PW-2) who had found following injuries on his person.

One incised wound 4 ½" x 1" x skull bone deep on the right side of head injuring the right parietal lobe of brain (laceration of the cortex cell) leading to unconsciousness and paralysis of the left side of body)

In the opinion of the doctor injury was caused on account of sharp cutting weapon and was grievous in nature. Age of injury was determined within four hours.

On account of critical condition of Lala Mahto, he was brought to PMCH on 23.06.1982 itself and was attempted and treated there and during course thereof he succumb to his injury. During said course, he was examined by C.W.2 who found following injury on his person:-

1) Lacerated wound on the scalp.

2) Fracture of the skull bone.

3) Brain matter was protruding.

4) Patient unconscious

5) Pupil dilated on right side.

6) Fracture of the skull bone was seen in X-ray plate no.4535.

7) No foreign body was found.

Age of the injury could not determined. He further accepted that in case Bullet is found passes grazing the skull, the injury no.1 and 2 could be produced.

The doctor PW-2 though was not declared hostile on this score but his finding was challenged by the prosecution and further was suggested to the extent that the aforesaid injury was caused by rifle which he denied. During cross-examination he had deposed that rifle is not a sharp cutting weapon so it will not cause sharp cutting injury. However is found contradicted by C.W.2 on this score.

The aforesaid doctor though should have been recalled by the prosecution if his presence was so necessitated but instead thereof, was again examined as an independent witness PW-8 and during said course he had exhibited the postmortem report scribe by Dr. R.B. Choudhary who conducted postmortem over the dead body of Lala Mahto on the ground that aforesaid Dr. R.B. Choudhary had died.

Postmortem report happens to be Ext.-7 and on account of death of R.B. Choudhary now the same could be taken into consideration with the aid of Section 32(1) of the Evidence Act. During course of postmortem, the doctor had found following ante mortem injury.

(1) Incised wound 4 ½" x 1" x brain deep on the vault of head (slightly on right side).

(2) On dissection skull was cut and fractured corresponding to the level of injury no.1. Brain was lacerated by pieces of bone. There was sub dural heumotoma found over the surface of brain.

The time elapsed since death was within 36 hours.

The doctor had opined that the injury was caused by sharp

cutting heavy weapon cause of death was shown as on account of head injury.

So there happens to be consistent evidence of the doctor with regard to presence of single injury over head of deceased which, in the opinion of the doctor has been on account of sharp cutting weapon.

11. PW-2 had also examined injured Bindeshwari Prasad as well as Anandi Prasad and found the following:

(A) Bindeshwari Prasad:-

1) One lacerated wound 1" x ¼" x ¼" on the head arterially.
2) Three lacerated wounds of various sizes ranging from 2 ½" x ¼" x ¼" to 1" x ¼" x ¼" on the back.

(B) Anandi Prasad:-

1) Multiple pea sized gun shots wounds (Pilate) on the left on the left scapular region of the back. All were superficial.
2) One pea size wound was on the left side of head posterially and it was superficial.

So in the opinion of doctor the injury sustained by Bindeshwari Prasad was caused by hard and blunt substance and were simple in nature while the injuries found over the persons of Anandi, the informant it was a gun shot injury.

They were also examined at PMCH by CW-2 who had found following injury:-

(A) Anandi Prasad:-

1. Lacerated wound on scalp 2" long.
2. Pellet like injury mask on left shoulder.

On the same date and time he had examined Bindeshwari Prasad found following injury:-

1. A stitched wound on the scalp.
2. The patient was unconscious.
3. On X-ray showed nothing abnormal.

12. Now adverting to the ocular evidence, PW-1 is found to be declared hostile but had admitted murder of Lala Mahto was committed about three years ago. PW-2 (PW-8) is the doctor, who had proved injury reports relating to Lala Mahto (deceased) as well as Anandi & Bindeshwari as well as exhibited PM report. The same status happens to be with regard to C.W.2, Dr. K.P. Yadav. So far evidence of C.W. 1 is concerned, he happens to be formal in nature as placed relevant document. So far PW-9 is concerned he also happens to be formal as brought material exhibit. In like wise manner evidence of PW-3 remains.

13. The remaining witnesses happen to be material witness. PW-4 had deposed that on the day and time of occurrence while he was going to ease himself towards south to his village he found Lala Mahto ploughing the field while Anandi was sowing the seed. At that time Dulli Mahto armed with lathi, Ram Khelawan armed with rifle, Siwan Mahto, Baleshwar Mahto, Ram Lagan Prasad, Surendra, Rajendra, Arun armed with gun, Ram Bilas and Umesh armed with Garasa and Subhash armed with Bhala came and said that they will not allow to plough the field. Lala Mahto

retaliated by saying that land belongs to him, hence he will plough. On this Dulli Mahto ordered. Khelawan fired causing injury over head of Lala Mahto who fell down. Blood began to ooze. Thereafter, Baleshwar had fired causing injury over left upper portion of back as well as over head. Ram Bilash assaulted with Garasa over head of Anandi. Umesh and Dulli assaulted Bindeshwar with Paina which was corrected as Dulli had assaulted with Lathi and Umesh with Garasa then thereafter all of them left the place. They have taken dead body to P.S. along with Anandi and Bindeshwar. During cross-examination he had narrated that the total area of the disputed land happens to be six decimal having boundary North Dulli Mahto, South Harnath Sah, West Lala Mahto and East Prabhu Mahto. He had not seen quarreling Dulli Mahto with Lala Mahto with regard to the disputed land. However, the dispute was going on amongst them with regard to other plot lying in the same vicinity. A 144 and 145 Cr.P.C. proceeding had already been fought in between. In para-5 he had deposed that he was going towards pond lying South to the village and during said course he had seen mob present at the disputed land who were only accused persons. He heard sound of firing from that place only. He became afraid of and remained there. The persons who were engaged in nearby field witness the same. In para-6 had said that the villagers came after half an hour. Accused persons had already escaped there from before arrival of the villagers. Then thereafter he had gone to the place of occurrence and had seen the injured. In para-10 there happens to be contradiction. In para-11 had denied with regard to counter case. He had further denied having Dulli Mahto in injured condition.

14. P.W.-5 is one of the injured who had deposed that on the alleged date and time of occurrence he along with his father Lala Mahto brother Anandi and Indu had gone to the P.O. land and were engaged in agriculture work. At that very time Dulli armed with lathi, Ram Khelawan armed with rifle, Sheo Nandan, Baleshwar, Ram Lagan, Arun, Surendra and Rajendra armed with gun, Subhash armed with Bhala, Ram Bilas and Umesh armed with Garasa came there out of whom Khelawan had forbidden his brother Anandi to plough the field. He claimed the land belongs to him. The same was retaliated over which Dulli ordered to kill. Ram Khelawan fired causing injury over head of his father. Baleshwar fired causing injury over upper portion of back Anandi as well as head. Ram Bilas had assauled with Garasa over his head. Umesh and Dulli had assaulted him with Garasa and lathi respectively. Other accused were terrorizing the villagers by making indiscriminate firing. Then thereafter all the accused persons left therefrom. Brahamdeo Sah, Jagarnath Yadav, Kameshwar Yadav and Biseshwar Sah along with others have witnessed the occurrence out of whom Biseshwar had gone in camp of accused. Thereafter, the villagers lifted his father to P.S. along with them where his brother Anandi gave his fardbeyan. Thereafter they were sent to hospital from where they were referred to PMCH during course of which his father died. On 20.07.1982 he had produced blood stain cloth before the police. During cross-examination at para-2 had admitted that both the persons are on litigating term since before the occurrence. In para-4 he had disclosed that his father had ploughed the aforesaid land about three or four days ago. As he was not present so he could say whether any sort of

litigation had taken place or not. At the time of occurrence paddy seed was being sown. Then said that at that very time the field was being ploughed as well as they were also engaged in putting seed. He had given the boundary of the land North Dulli Mahto, South Harnath Sah, East and West Lala Mahto (Prosecution party). Then had disclosed that the Khesra number of P.O. land happens to be 3497. He is not aware with the fact whether there was any sort of dispute with regard to P.O. land. In para -9 had said that he had gone to P.O. land along with his father and brother. They have not met with accused in midst of way. He had not seen the accused persons in the vicinity of the P.O. land. In para-11 had said that for the first time he had seen accused persons at some distance from his field approximately four lagga west who were variously armed. They came and said to shoot over which firing was made. His brother Indu fled away while they remained in the field. Firing was made which cause injury to his father. At that very time his father was east to him at a distance of 4-5 hands. He has seen his father sustaining firearm injury at Southern-Western corner of the field. He fell down over which he along with Anandi rushed and tried to lift. No firing was made at that very time. Then said that they had already sustained injury. He further said that Anandi had sustained injury just after falling of his father. The whole occurrence was over within 5 to 10 minutes. He had said that even after sustaining gun shot injury his brother rushed to his father. He also gone there and during course thereof, he was assaulted. In para-14 had said that he had not found any injury over the person of Umesh and Ram Khelawan at the P.O. He himself volunteered in course of fleeing there was

confrontation with villagers during course of which they sustained injury. He had also heard with regard to Dulli Mahto. In para-12 had disclosed that he had seen blood at Southern-Western corner of his field.

15. PW-6 is Brahamdeo Sah. He had said that on the alleged date and time of occurrence while he was going to plough his own field, he had seen Lala Mahto sowing seed in his field while Anandi Mahto was ploughing the filed. Bindu and Indu both were present there. He had seen Dulli Mahto, Khelawan Mahto, Siwan Mahto, Baleshwar Mahto, Rajendra Mahto, Surendra Mahto, Arun, Ram Bilas, Ram Lagan and Subhash came there out of whom Dulli was armed with lathi, Ram Khelawan was armed with rifle, Siwan, Baleshwar, Rajendra, Surendra, Ram Lagan and Arun were armed with Gun, Subhash was armed with Bhala, Umesh and Ram Bilas were armed with Garasa. They, after coming to the field, directed them not to plough but they (prosecution party) did not accede over which on an order of Dulli Mahto, Khelawan fired from his rifle which strruck over head of Lala, causing injury. Thereafter he fell down. Baleshwar and Ram Bilas assaulted with gun as well as Garasa respectively. Umesh and Arun again corrected Umesh and Dulli assaulted Bindeshwari with Garasa and Lathi respectively. Then thereafter they all escape there from. Villagers have come who took away Lala Mahto. After arrival of I.O. he had shown P.O. I.O. had seized live cartridges, empty cartridges there from for which seizure list was prepared over which he put his signature. During cross-examination in para-3 had admitted that he was on litigating term with Dulli Mahto since long and had detailed the same. In para-6 further disclosed that he had got five or

six plots in the vicinity of the P.O. land. In para-7 he had disclosed that he had not met with accused persons during midst of way. When he reached at the place of occurrence, he had not found mob. He had not heard sound of firing. Then had disclosed that when he proceeded South after crossing canal, he heard 10 to 15 rounds of firing over which he gave his attention. He had not seen commotion rather the persons were present at the place where they were. He had seen about fifty persons East to the village near Khalihan. In para-9 had disclosed that he had not identified any of them on account of commotion. In para-11 he had disclosed that there was hue and cry after ten minutes of occurrence. He had also reached at the P.O. where 50 to 100 persons also came wherein he named Radhe Sah, Hirdaya Sah, Jagmohan Sah, Tanik Sah, Sukhuru Sah and Jagarnath Yadav. In para-12 had disclosed that he had found all the three injured at three different places in the P.O. field. Lala was unconscious while two others were groaning. He had no talk with them regarding occurrence. Then thereafter he came back to his own plot. He had seen the accused persons coming from East to West and going towards P.O. just adjacent to his field and so he had identified them. In para-13 had said that he had seen whole occurrence from his own filed. Lala, Bindu, Anandi were surrounded by the accused persons. In para-14 had said that he had seen blood oozing from the injuries over the person of Anandi and Indu. He had not seen blood coming out from the injury of Lala as blood had already fallen over ground. In para-17 had said that the P.O. land belongs to Lala mahto which was already ploughed a day before. In para-19 he had said that he had not seen injury over person of Ram

Khelawan, Dulli and Umesh while they were passing through his field. He had not seen injury over their person even on second or third day of the occurrence. Dulli had filed case against Lala Mahto and others of assault.

16. P.W.-7 is the informant. He had deposed that on the alleged day and time of occurrence he along with his brother Bindeshwari Prasad, Indu Prasad and father Lala Mahto had gone to plough his field. He was ploughing field. At that time his father was sowing seed. Rest two were standing there. All of a sudden Khelawan Yadav armed with rifle, Balewhar Mahto armed with gun, Siwan Mahto, Arun Prasad, Surendra Prasad, Rajendra Prasad were armed with gun, Bilas Prasad, Umesh Prasad armed with Garasa, Subhash armed with Bhala and Dulli Mahto armed with lathi. Ram Lagan armed with Garasa came there. Khelawan had forbidden him to plough which was resisted by him. On this on an order of Dulli Mahto, Khelawan fired from his rifle causing injury over head of his father who fell down. Baleshwar had fired from his gun causing injury over upper portion of his back left side as well as over head, Bilas had given Garasa blow on account of which he became injured. Ram Lagan assaulted Bindeshwari with Garasa. Rest accused persons who were armed with gun also fired and on account thereof none of the villagers came there out of fear. Then thereafter accused persons fled away. Kameshwar Yadav @ Kamewhar Prasad, Brahamdeo Sah, Ramu Sah, Jagarnath Yadav and others have witnessed the occurrence. The villages then thereafter came and they took his father to Bind P.S. accompanied by he himself as well as his brother where he had given his fardbeyan. The police had also prepared injury report to respective

injured and sent them to hospital from where they were shifted to Biharsarif and then to PMCH where his father died on 26.06.1982 during course of treatment. During cross-examination he had admitted that he is undergoing sentence for causing murder of Umesh and Ram Lagan. In para-11 had disclosed that the Khesra number of P.O. land happens to be 3497. Then he had shown his ignorance to the effect that his father had already executed document in favour of Bhaso Bind. He reiterated that the land happens to be in their possession. Then had denied the suggestion that after selling the other plots having redeemed the usufructuary mortgage on 29.03.1986 and so on the alleged date and time of occurrence Plot No. 3497 was not in their possession. Then had admitted that Khesra No.3495 which lies north to P.O. and belongs to accused Siwan Mahto. Then had denied the suggestion that they have gone over plot no.3495 on the day of occurrence. In para-13 had said that a day prior to the occurrence the P.O. land was ploughed but as the grass remained therefore it was again been ploughed. In para-14 he had said that he is not aware whether on the alleged date of occurrence accused Umesh, Ram Khelawan and Dulli have injuries over their person. He had not seen them at Biharsarif Hospital. He had admitted that accused persons have also filed criminal case for the same date and time of occurrence wherein he along with Indu, Kameshwar, Nanhan, Lala and Kishori happens to be an accused. Lal had died at PMCH on 26.06.1982. He further disclosed that in the counter case there happens to be an allegation against them that while Dulli Mahto sitting South-West to the house of Raghunath Mahto, they have gone there and assaulted along with Umesh and Khelawan. In para-15 he

had admitted that there happens to be litigation amongst the family of Dulli he himself as since long but he cannot say whether any proceeding was with regard to plot no.3497. Then had admitted that accused persons had not forwarded their claim before the date of occurrence with regard to survey plot no.3497. In para-18 he had narrated that all the accused persons came over plot no.3497 and stayed at its Western flank. His father was shot at from distance of 6-7 steps. Marpit will took place in the middle. At the time of assault he along with his brother and his father were over plot no.3497. In para-19 he had disclosed that he had seen striking the cartridge over head of his father. He had also seen Garasa blow over person of Bindeshwar. They both sustained injury earlier than he himself. He had not escaped there from even after seeing the assault. Then had denied the suggestion that no such type of occurrence had ever taken place rather only to save from the case launched by Dulli Mahto, he has launched this case.

17. PW-10 happens to be the Investigating Officer who had recorded fardbeyan of Anandi on 23.06.1982 at the Bind P.S. itself at about 07:30 AM. Then thereafter the FIR was sent to Asthama P.S. and investigation was entrusted to him. He had taken further statement of informant issued injury report and then sent the injured to Hospital. He had also recorded statement of Bindeshwari and then thereafter he proceeded to place of occurrence. As pointed out by Brahamdeo he had inspected the place of occurrence which happens to be survey plot no.3497. Survey plot no.3495 lies adjacent to it and these two plots are the place of occurrence. He had seized one butt, Boalt, live cartridge, empty cartridge, two empty

cartridges of .315 rifle, blood stain earth from Survey Plot No.3497 in presence of two seizure list witnesses. He had seen survey plot no.3497 ploughed and paddy seed was sowed. He had also seen half portion of survey plot no.3495 ploughed. Then had exhibited the material exhibit. Recorded the statement of witnesses. Conducted raid in the village and arrested Dulli Mahto, Ram Khelawan Mahto, Umesh Prasad, Sheo Nandan Mahto. Then returned back to Police Station. Again visited the place of occurrence. Received injury report of respective injured. He was informed regarding death of Lala therefore on 30.06.1982 he had gone to PMCH where he received inquest report. Also recorded statement of Ramashish Paswan, Jagarnath Yadav, Bisesher Sao. On 20.07.1982 Bindeshwar Prasad handed over blood stain cloth for which production list was prepared which he had exhibited. On 30.08.1982 Baleshwar Produced Rifle No.9104 which was later on sent to Forensic Science Laboratory for examination. He exhibited the letter as well as the report. He handed over charge on 11.12.1982 on account of transfer. Then his attention was drawn towards previous statement of PW-1. During cross-examination at para-14 he had admitted that after arrival at the P.O. village he had found Dulli Mahto, Ram Khelawan Mahto, Umesh Prasad and Shivnandan at their houses respectively. He had made search of their houses but had not found Gun, Rifle, Bhala, Garasa. He had seen Dulli Mahto, Ram Khelawan Mahto and Umesh in injured condition and his condition was precarious. He had prepared the injury report and sent them to Hospital. Before that he had recorded fardbeyan of Dulli Mahto on the basis of which Case No.118/1982

was registered and had exhibited the same. After completion of investigation he had submitted charge sheet. In para-16 had deposed that P.O. of the case instituted by accused Dulli Mahto happens to be Southern-Western corner of house of Raghunath Mahto as well as West of house of Dulli Mahto. He had found blood spot. he had further narrated at para-17 that none of the prosecution party had placed document with regard to plot no.3497. He had found the total area of plot no.3497 ploughed and paddy seed was sowed in some area. He had also found western portion of Khesra no.3495 also ploughed. He had deposed in para-18 that before 20.07.1982 none had produced bloodstained cloth. He had further disclosed that on 20.08.1982 rifle was produced before him which was sent to Forensic Science Laboratory. Then he said that he had not recorded statement of witnesses from accused side. Then there happens to be contradiction with regard to witnesses.

18. The first foremost point over which learned counsel for the appellant gave much stress is with regard to non-explanation of injury sustained by the accused persons. It is worth mentioning to note that injuries sustained by the accused persons during course of commission of same occurrence is to be taken note of and for that certain parameters have been prescribed by the Hon'ble Apex Court. When there happens to be two independent occurrence as alleged then in that event no such obligation is to be discharged by the prosecution. After going through Exhibit-B , it is evident that the same was recorded at 09:30 AM on 23.06.1982 wherein the place of occurrence has been shown near the house of Raghunath Mahto and

the time of occurrence has been shown as 06:10 AM. The fardbeyan of first case (Exhibit-9) was recorded at the P.S. at 07:30 AM and the time of occurrence happens to be at 06:00 AM. Furthermore, the P.O. happens to be the field lying at east to the village under Milki Khanda. Apart from this when the contents of the Exhibit-B has been gone through minutely, it is evident that the informant had disclosed that an occurrence took place over field as a result of which assault had taken place wherein Umesh Yadav was assaulted by Lala Mahto and Kishori Yadav by means of Garasa, on account of which he has become injured and is at his house.

19. While cross-examining PW-2 the defence had also got exhibited injury report of Umesh Prasad, Ram Khelawan Mahto, Dulli Mahto as Exhibit-A, A/1 and A/2. After having close scrutiny of Exhibit-A Series as well as Exhibit-B, it is evident that there happens to be prima facie material on the record to suggest that Dulli Mahto, Umesh and Khelawan have sustained injury. It is also evident that with regard to injury of Umesh Exhibit–B speaks to have sustained at the field itself where assault took place while with regard to the injury over person of Dulli and Khelawan, it happens to be near the house of Raghunath Mahto. Moreover Umesh had sustained injury as:

1) Fracture of Lt. waist causing incised wound 2½" x 1½" laterally cutting the whole soft tissue at soft of radius Bone.
2) Incised wound 1½" x ¼" x ½" on the right forearm 1" below elbow.
3) Incised penetrating would ½" x ½"x1" on the Lt. side of chest over heart area.

4) Incised would 1 ½" x ¼" on the head interior at its middle.
5) Incised wound 1½" x ¼"x ¼" on the Lt. thigh.
6) Incised would 1½" x 1/6" on the neck.

Injury No. 1 was grievous and 2 to 6 simple caused by sharp cutting weapon.

20. When the evidence of the prosecution witnesses as detailed herein before have been gone through, it is evident that none of the witnesses were suggested that any kind of occurrence whereunder Umesh had sustained injury at the hands of prosecution party had ever taken place at the field itself and so far injuries with regard to Dulli and Khelawan are concerned, it is evident that same was near the house of Raghunath. But from Exhibit-B one thing is apparent by way of admission that an occurrence had taken place at the field with regard to land dispute and that happens to be also the genesis of occurrence.

21. Though the appellants have kept mum during course of statement recorded under Section 313 of the Cr.P.C. as well as there happens to be absence of DW on the material aspect, apart from the fact that none of the prosecution witnesses have been suggested that on account of land dispute they had assaulted Umesh at the field itself, will not adversely affect the prospect of the case having unexplained version of prosecution with regard to injury sustained by accused. The legal principle formulated by the Hon'ble Apex Court on this score happens to be that when there happens to be presence of consistent, reliable, trustworthy evidence adduced on behalf of prosecution, then in that event non-explanation of injury having over the

person of accused could not be found to be adverse to the prosecution case.

22. In a case of ***Waman & Ors. Vs. State of Maharashtra*** reported in ***(2011) 7 SCC 295*** at para 36, it has been observed in following manner:

> "36. Ordinarily, the prosecution is not obliged to explain each injury on an accused even though the injuries might have been caused in the course of occurrence, if the injuries are minor in nature, however, if the prosecution fails to explain a grievous injury on one of the accused persons which is established to have been caused in the course of the same occurrence then certainly the court looks at the prosecution case with a litter suspicion on the ground that the prosecution has suppressed the true version of the incident. However, if the evidence is clear, cogent and creditworthy then non-explanation of certain injuries sustained by the deceased or injury on the accused ipso facto cannot be the basis to discard the entire prosecution case."

23. So far relevancy of Exhibit-B is concerned, that is to be taken into account in terms of the principle laid down by the Hon'ble Apex Court in a case ***Bable @ Gurdeep Singh Vs. State of Chhattisgarh*** reported in ***AIR 2012 SC 2621***.

> "16. But, because of lodging of FIR, Ext D2, and his statement under Section 313 of the Cr.P.C., one fact that completely stands established and is undisputable is that the appellant was present at the place of occurrence and also that he had a fight with the deceased. Once these two circumstances are admitted, they fully provide corroboration to the dying declaration, the statements of PW 11 and PW 14 as also the other material evidence led by the prosecution. If the appellant was carrying a sword and others were carrying lathis, it is not understandable as to how could the deceased suffer as many as 15 injuries including the incised wound, abrasion, amputation of middle finger from terminal phalages and other serious injuries and the appellant merely suffered six simple injuries. This itself belies the stand taken by the appellant. In any case, the deceased could have not caused injuries to any other person as in consequence of the assault upon himself, he would have had no strength left to cause any injury to others. Strangely, the accused denied all other questions as 'maloom nahin' (don't know) or 'incorrect' and gave explanation which is not worthy of any credence."

24. Now coming to the other aspects, relating to inconsistency amongst the ocular evidence in consonance with the medical evidence, it has been submitted that from the evidence of PW-2, it is evident that Lala Mahto had sustained one incised wound 4 ½" x 1"x scalp bone deep caused by a sharp cutting wound and the presence of simple injury is further found corroborated with CW No.2 Dr. K.P. Yadav who had examined the deceased on 23.6.1982 at PMCH opined that:-

i. Lacerated wound on the scalp.
ii. Fracture of the scalp bone present.
iii. Brain metal protruding.
iv. X
v. X
vi. Fracture of the scalp bone was seen in X-ray plate No.45, 35.
vii. No foreign body was found.

However regarding opinion over injury, the weapon used in inflicting these injuries was a hard and blunt substance.

25. Then, it has been admitted that if a bullet passed grazing scalp, the injuries no.1 and 2 could be produced. During cross-examination at para-16 he had opined:-

> "16. I did not find any hair on head of Lala Mahto raised which ought to have raised if there was grazing of bullet. On a perusal of the detas of the injuries in Lalas head and skull and having regard to the fact that this was no raising of hair on head, there was no possibility of the same having caused by a bullet. At least it was unusual. Usually such would could be produced of hard and blunt substance such as lathi or heavy sharp cutting weapon such as Pharsa, Garasa and like weapon. A bullet is also of hard

and blunt substancebut it is unusual of producing this injuries which I found on the head and skull of Lala in particular.

26. As disclosed above, the doctor who had conducted postmortem, Sri R.B. Choudhary happens to be dead and on account thereof the postmortem report legally been admitted, n evidence after having it exhibited by PW-8. In the opinion of the doctor the following ante-mortem injury was found over the person of deceased Lala Mahto:

One incised wound 4 ½" x 1" x brain deep on the vault of the head.

On dissection skull was cut and fracture corresponding to the level of injury no.1. Brain was lacerated by pieces of bone. There was subdural humotozoma found over the surface of brain.

In the opinion of doctor, the injury was caused by sharp cutting heavy weapon.

Hence from the evidence all the three doctors who have had examined the deceased as well as conducted postmortem, it is manifest that they all are inconsistent to each other and that is found having their inefficiently in identifying the real cause of injury.

27. Now the sole question raised whether the injury as found by the doctor could be resultant of the bullet injury. As per Modi's Medical Jurisprudence and Toxicology 23rd Edition attention page 800 it has been found " when a bullet with high velocity causes a glancing blow, it may cause guttering of the outer table of skull, usually the inner table is also involved and shows irregular as depressed fracture." Therefore, it could not be said that the injury in its physical presence will not be possible to be caused during course of firing. The learned trial court had taken into account

the aforesaid aspect in para-24 of his judgment.

28. The status of expert and relevance of its evidence has been subject of detail discussion in a case ***Dayal Singh and Ors. Versus State of Uttaranchal*** reported in ***(2012) 8 SCC 263.***

> **"35.** This brings us to an ancillary issue as to how the Court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour of the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In *Kamaljit Singh* v. *State of Punjab (2003) 12 SCC 155*, the Court, while dealing with the discrepancies between ocular and medical evidence, held: (SCC p. 159, para 8)
>
> > "*8.* It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out."
>
> **36.** Where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.
>
> > "*34.* … The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by [examining] the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert's opinion is accepted, it is not the opinion of the medical officer but [that] of the court."
>
> (See *Madan Gopal Kakkad* v. *Naval Dubey (1992) 3 SCC 204*, SCC pp. 221-22, para 34.)
>
> **37.** Profitably, reference to the value of an expert in the eye of the law can be assimilated as follows:
>
> > "The essential principle governing expert evidence is that the expert is not only to provide reasons to support his

opinion but the result should be directly demonstrable. The court is not to surrender its own judgment to that of the expert or delegate its authority to a third party, but should assess his evidence like any other evidence.

If the report of an expert is slipshod, inadequate or cryptic and the information of similarities or dissimilarities is not available in his report and his evidence in the case, then his opinion is of no use. It is required of an expert whether a government expert or private, if he expects, his opinion to be accepted to put before the court the material which induces him to come to his conclusion so that the court though not an expert, may form its own judgment on that material. If the expert in his evidence as a witness does not place the whole lot of similarities or dissimilarities, etc., which influence his mind to lead him to a particular conclusion which he states in the court then he fails in his duty to take the court into confidence. The court is not to believe the ipse dixit of an expert.

Indeed the value of the expert evidence consists mainly on the ability of the witness by reason of his special training and experience to point out the court such important facts as it otherwise might fail to observe and in so doing the court is enabled to exercise its own view or judgment respecting the cogency of reasons and the consequent value of the conclusions formed thereon. The opinion is required to be presented in a convenient manner and the reasons for a conclusion based on certain visible evidence, properly placed before the Court. In other words the value of expert evidence depends largely on the cogency of reasons on which it is based." [See *Forensic Science in Criminal Investigation & Trial* (4th Edn.), by B.R. Sharma.]

38. The purpose of expert testimony is to provide the trier of fact with useful, relevant information. The overwhelming majority rule in the United States, is that an expert need not be a member of a learned profession. Rather, experts in the United States have a wide range of credentials and testify regarding a tremendous variety of subjects based on their skills, training, education or experience. The role of the expert is to apply or supply specialised, valuable knowledge that lay jurors would not be expected to possess. An expert may present the information in a manner that would be unacceptable with an ordinary witness. The common law tried to strike a balance between the benefits and dangers of expert testimony by allowing expert testimony to be admitted only if the testimony were particularly important to aiding the trier of fact. Even in the United States, if the helpfulness of expert testimony is substantially outweighed by the risk of unfair prejudice, confusion or waste of time, then the testimony should be excluded under the relevant Rules, and State equally balanced. Expert testimony on any issue of fact and significance of its application has been doubted by the scholars in the United States. Even under the law prevalent in that country, the opinion of an expert has to be scientific, specific and experience based.

Conflict in expert opinions is a well-prevalent practice there. While referring to such incidence David H. Kaye and other authors in *The New Wigmore: A Treatise on Evidence—Expert Evidence* (2004 Edn.) opined as under:

> "The District Court opinion reveals that one pharmacologist asserted 'that Danocrine more probably than not caused plaintiff's death from pulmonary hypertension,' but it describes the reasoning behind this opinion in the vaguest of terms, referring only to 'extensive education and training in pharmacology' and an unspecified 'scientific technique' that 'relied upon epidemiological, clinical and animal studies, as well as plaintiff's medical records and medical history…'. The nature of these studies and their relationship to the patient's records is left unstated. The District Court incanted the same mantra to justify admitting the remaining testimony. It asserted that the other experts 'similarly base their testimony upon a careful review of medical literature concerning Danocrine and pulmonary hypertension, and plaintiff's medical records and medical history'.
>
> The court of appeals Zuchowicz v. United States, 140 F 3d 381 (2d Cir CA 1998) elaborated on the testimony of two of the experts. The physician 'was confident to a reasonable medical certainty that the Danocrine caused Mrs Zuchowicz's PPH' because of 'the temporal relationship between the overdose and the start of the disease and the differential etiology method of excluding other possible causes'. Yet the 'differential etiology' here was barely more than a differential diagnosis of PPH. The causes of PPH are generally unknown and it appears that the only other putative alternative causes considered were drugs other than Danocrine. It is not at all clear that such a 'differential etiology' is adequate to support a conclusion of causation to any kind of a 'medical certainty'. The pharmacologist, not being a medical doctor, testified 'to a reasonable degree of scientific certainty … [that] the overdose of Danocrine, more likely than not, caused PPH…'. He postulated a mechanism by which this might have occurred: '(*1*) a decrease in estrogen; (*2*) hyperinsulinemia, in which abnormally high levels of insulin circulate in the body; and (*3*) increase in free testosterone and progesterone … that … taken together, likely caused a dysfunction of the endothelium leading to PPH'.
>
> In sum, plaintiff's experts did not know what else might have caused the hypertension, and they offered a conjecture as to a causal chain leading from the drug to the hypertension. This logic would be more than enough to justify certain clinical recommendations—the advice to Mrs Zuchowicz to discontinue the medication, for example. But is it enough to allow an expert not merely to testify to a reasonable diagnosis of PPH, or 'unexplained pulmonary hypertension', as the condition also is known, but also be able to propound a novel explanation that has yet to be verified, even in an animal model?"

> **39.** The Indian law on expert evidence does not proceed on any significantly different footing. The skill and experience of an expert is the ethos of his opinion, which itself should be reasoned and convincing. Not to say that no other view would be possible, but if the view of the expert has to find due weightage in the mind of the court, it has to be well authored and convincing. Dr C.N. Tewari was expected to prepare the post-mortem report with appropriate reasoning and not leave everything to the imagination of the Court. He created a serious doubt as to the very cause of death of the deceased. His report apparently shows an absence of skill and experience and was, in fact, a deliberate attempt to disguise the investigation.
>
> **40.** We really need not reiterate various judgments which have taken the view that the purpose of an expert opinion is primarily to assist the court in arriving at a final conclusion. Such report is not binding upon the court. The court is expected to analyse the report, read it in conjunction with the other evidence on record and then form its final opinion as to whether such report is worthy of reliance or not. Just to illustrate this point of view, in a given case, there may be two diametrically contradictory opinions of handwriting experts and both the opinions may be well reasoned. In such case, the court has to critically examine the basis, reasoning, approach and experience of the expert to come to a conclusion as to which of the two reports can be safely relied upon by the court. The assistance and value of expert opinion is indisputable, but there can be reports which are, ex facie, incorrect or deliberately so distorted as to render the entire prosecution case unbelievable. But if such eyewitnesses and other prosecution evidence are trustworthy, have credence and are consistent with the eye-version given by the eyewitnesses, the court will be well within its jurisdiction to discard the expert opinion. An expert report, duly proved, has its evidentiary value but such appreciation has to be within the limitations prescribed and with careful examination by the court. A complete contradiction or inconsistency between the medical evidence and the ocular evidence on the one hand and the statement of the prosecution witnesses between themselves on the other, may result in seriously denting the case of the prosecution in its entirety but not otherwise."

29. The ticklish issue has been taken into account by the Hon'ble Apex Court and the Hon'ble Apex Court has consistently taken the view that except where it is totally irreconcilable with the medical evidence, oral evidence has primacy. In ***Abdul Sayeed v. State of M.P.*** reported in ***(2010) 10 SCC 259*** it has been held:

> **"38.** In *State of U.P.* v. *Hari Chand (2009) 13 SCC 542* this Court

reiterated the aforementioned position of law and stated that: (SCC p. 545, para 13)

> "*13.* … In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy."

39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.

40. In the instant case as referred to hereinabove, a very large number of assailants attacked one person, thus the witnesses cannot be able to state as how many injuries and in what manner the same had been caused by the accused. In such a fact situation, discrepancy in medical evidence and ocular evidence is bound to occur. However, it cannot tilt the balance in favour of the appellants."

30. The same view has been reiterated in ***Baso Prasad v. State of Bihar*** reported in ***(2006) 13 SCC 65*** wherein it has been held:

> **"27.** In some cases, medical evidence may corroborate the prosecution witnesses; in some it may not. The court, however, cannot apply any universal rule whether ocular evidence would be relied upon or the medical evidence, as the same will depend upon the facts and circumstances of each case. No hard-and-fast rule can be laid down therefor.
>
> **28.** It is axiomatic, however, that when some discrepancies are found in the ocular evidence vis-à-vis medical evidence, the defence should seek for an explanation from the doctor. He should be confronted with the charge that he has committed a mistake. Instances are not unknown where the doctor has rectified the mistake committed by him while writing the post-mortem report."

31. In ***Krishnan v. State*** reported in ***(2003) 7 SCC 56,*** it has been held:

> **"18.** The evidence of Dr Muthuswami (PW 7) and Dr Abbas Ali (PW 8) do not in any way run contrary to the ocular evidence. In any event, the ocular evidence being cogent, credible and trustworthy, minor variance, if any, with the medical evidence is not of any consequence.
>
> **20.** Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical

witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

21. It is trite that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for its credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

32. Taking into account the aforesaid principle enunciated by the Hon'ble Apex Court, when we revert back to the evidence having on record, it is evident that there happens to be consistent evidence with regard to assault over the person of Lala Mahto by Khelawan by means of rifle. Presence of live as well as empty .315 Bore rifle cartridge from the P.O. is also found a supportive link.

33. Now, coming to the another aspect, it is evident that Bindeshwar and Anandi both sustained injury during said course and were examined by PW-2 as well as by CW-2 as referred by the treating doctor. The evidence of injured witness cannot be brushed aside in normal phenomenon rather their evidence should be considered with more weight-age because of the fact that presence of injury suggest presence of witness at the place of occurrence. The same view has been reiterated by the Hon'ble Apex Court in a case ***Bhajan Singh @ Harbhajan Singh v. State of***

Haryana reported in (2011) 7 SCC 421.

> **"36.** The evidence of the stamped witness must be given due weightage as his presence on the place of occurrence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present at the time of occurrence. Thus, the testimony of an injured witness is accorded a special status in law. Such a witness comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness." Thus, the evidence of an injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide *Abdul Sayeed* v. *State of M.P. (2010) 10 SCC 259*; *Kailas* v. *State of Maharashtra (2011) 1 SCC 793*; *Durbal* v. *State of U.P. (2011) 2 SCC 676* and *State of U.P.* v. *Naresh (2011) 4 SCC 324*.)

34. So far this peculiar case is concerned, as referred above there happens to be counter case Exhibit-B wherein the defence had itself admitted quarrel followed with assault at the field at an earlier occasion wherein Umesh had sustained injury. Therefore, by Exhibit-B the defence had also admitted an occurrence having taken place at the field before the time of occurrence.

35. The FSL report relating to rifle produced by Baleshwar one of the appellant on 20-08-1982 is of no consequence because of the fact that the occurrence is of dated 23.06.1982 and this part of appellant further suggest that after getting the connecting evidence erased and vanished then thereafter only rifle was produced.

36. At this juncture one should not lost sight of objective finding of the IO who had visited the place of occurrence on the same day

and found blood stain at the spot as well as broken butt of gun, one bolt, live cartridge, one empty cartridge, two empty cartridge of .315 bore rifle was seized and that is also indicative of the fact that an occurrence had taken place over the survey plot no.3497.

37. Though the IO had found during inspection of place of occurrence some portion of plot no.3495 plough belonging to the accused but because of the fact that appellants have kept mum therefore in that event it cannot be presumed that the prosecution party have encroached upon the land belonging to the appellant.

38. Three DWs have been examined on behalf of appellant wherein the status of DW-1 and DW-2 happens to be formal in nature. DW-3 also stood in the same category but with certain difference through whom the appellant have tried to place that the land under dispute was mortgaged vide document no.17657 of 1982. Neither any prayer has been made on behalf of appellant before the court to direct the mortgagee to deposit the mortgage deed nor any step was taken on behalf of appellant to bring mortgagee to witness box that on the alleged date and time of occurrence the P.O. land was under his possession. Not only this, the suggestion given to the prosecution party regarding redemption was flatly refused. Mere subsistence of a document with a clause of redemption and further when the same is controverted, should have been properly brought up on record which could have at least discredited the prosecution version regarding, redemption nullifying the version of the prosecution to be over the land when alleged occurrence took place.

39. Thus, after having critical analysis of the evidence available on the record, it is found and held that prosecution had succeeded in getting the case proved beyond all reasonable doubt. As such, this appeal is found to be devoid of merit and is accordingly dismissed. All the appellants are on bail, hence their bail bond are cancelled and directed to surrender before the learned lower court to serve out sentences.

(Aditya Kumar Trivedi, J.)

(Shyam Kishore Sharma) I agree

(Shyam Kishore Sharma, J.)

Patna High Court
Dated, the 13th day of March, 2013
Prakash Narayan ***/A.F.R.***